Supreme Court, U.S.
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No. 95-1232

In The

Supreme Court of the United States

October Term, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF AMICUS CURIAE OF ENRON ACCESS CORPORATION IN SUPPORT OF RESPONDENT

THOMAS W. HILL *
PAUL D. RITTER, JR.
EMENS, KEGLER, BROWN, HILL & RITTER
65 East State St., Suite 1800
Columbus, Ohio 43215
(614) 462-5400
Counsel for Amicus Curiae

* *Counsel of Record*

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BRIEF AMICUS CURIAE OF ENRON ACCESS CORPORATION IN SUPPORT OF RESPONDENT

Amicus Curiae, Enron Access Corporation ("Enron Access"), hereby requests that the petition for a writ of certiorari to review the judgment of the Supreme Court of Ohio sought by Petitioner, General Motors Corporation ("General Motors"), be denied.

STATEMENT AND INTEREST OF AMICUS CURIAE

General Motors contends that natural gas purchased from an unregulated natural gas marketer and used in Ohio is exempt from Ohio sales and use tax because the gas is purchased from a "natural gas company." The Ohio Supreme Court determined that an unregulated natural gas marketer is not a "natural gas company" under Ohio law, and therefore gas purchased from an unregulated gas marketer is not exempt from Ohio sales and use tax. *General Motors Corp. v. Tracy*, 652 N.E.2d 188 (Ohio 1995).

General Motors has petitioned for a writ of certiorari to review the decision of the Ohio Supreme Court. Enron Access Corporation opposes the petition of General Motors. The interest of Enron Access in opposing General Motors arises because the decision of the Ohio Supreme Court is based squarely on the determination of the court that the term "natural gas company" under Ohio law refers only to a regulated public utility, and not to an unregulated natural gas marketer. This distinction between a regulated public utility and an unregulated natural gas marketer is absolutely crucial to the existence

of Enron Access, which is able to provide competitively priced gas to its customers for the very reason that it is not a "natural gas company" and is not subject to the pricing control and regulatory requirements applicable to public utilities. Enron Access therefore has a vital interest that the decision of the Ohio Supreme Court recognizing the distinction not be reviewed.

SUMMARY OF REASONS WHY WRIT SHOULD BE DENIED

An unregulated natural gas marketer such as Enron Access is not a "natural gas company" under Ohio law, and the Ohio Supreme Court correctly determined that purchases of natural gas by General Motors from unregulated natural gas marketers do not qualify for the exemption from Ohio sales and use tax granted for purchases of natural gas from a "natural gas company." The constitutional challenge raised by General Motors below was rejected by the Ohio Supreme Court, which correctly determined that denial of the exemption for purchases from an unregulated marketer (which does not own transportation or distribution facilities) does not violate the Commerce Clause or the Equal Protection Clause of the United States Constitution.

REASONS WHY WRIT SHOULD BE DENIED

Enron Access has been engaged in the business of purchasing and selling natural gas since 1982. Enron

Access does not own or control any natural gas transportation facilities, and Enron Access purchases and sells natural gas solely by contract with its customers, unregulated by any local, state or federal public utility authority. Enron Access and other similar unregulated natural gas marketers are clearly distinct from regulated public utilities which own transportation and distribution facilities and which sell natural gas to the general public.

Enron Access is one of several private gas marketers which sold natural gas to Petitioner General Motors during the years involved in this case. The Supreme Court of Ohio in its opinion in this case, and in its opinion in the companion case of *Chrysler Corp. v. Tracy*, 652 N.E. 2d 185 (Ohio 1995), determined that Enron Access is not a "natural gas company" as defined in Ohio Revised Code § 5727.01(E)(4), and therefore natural gas sold by Enron Access to a consumer such as Chrysler or General Motors does not qualify for exemption from Ohio sales and use tax under Ohio Revised Code §§ 5739.02(B)(7) and 5741.02(C)(2).

The decisions of the Supreme Court of Ohio in this case and in *Chrysler* are correct. Enron Access is not a "natural gas company" under Ohio law, and sales of natural gas by Enron Access to consumers are not exempt from Ohio sales and use tax under Ohio Revised Code § 5739.02(B)(7). Ohio law which imposes sales and use tax on gas sold by unregulated natural gas marketers, and which exempts gas sold by regulated public utilities from sales and use tax, is based on fundamental differences between unregulated natural gas marketers and regulated public utilities. This distinction is reasonable and facilitates the operation of the business of Enron Access

and all unregulated natural gas marketers, and therefore must be upheld.

The arguments presented by General Motors in its Petition as to the Commerce Clause and the Equal Protection Clause of the United States Constitution cannot be sustained in light of the holding of the Supreme Court of Ohio. General Motors' Petition provides no basis for granting a writ of certiorari. The response of the Tax Commissioner of Ohio to General Motors' Petition refutes the constitutional arguments of General Motors. Enron Access adopts the arguments presented by the Tax Commissioner, and strongly supports the position of the Tax Commissioner that General Motors' Petition should not be granted.

CONCLUSION

For the foregoing reasons, this Court should deny General Motors' petition for a writ of certiorari.

Respectfully submitted,

THOMAS W. HILL *
PAUL D. RITTER, JR.
EMENS, KEGLER, BROWN, HILL & RITTER
65 East State St., Suite 1800
Columbus, Ohio 43215
(614) 462-5400
Counsel for Amicus Curiae

* *Counsel of Record*

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